BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the *Ontario Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by Dena Potocnik dated October 25, 1988, alleging discrimination in employment on the basis of age and sex.

B E T W E E N :

Ontario Human Rights Commission

-and-

Dena Potocnik

Complainant

- and -

City of Thunder Bay

Respondent

INTERIM DECISION

Adjudicator : Lorne Slotnick

Date : June 5, 1996

Board File No: BI-0034-95

Decision No : 96-016-I

Board of Inquiry (*Human Rights Code*)
150 Eglinton Avenue East
5th Floor, Toronto ON M4P 1E8
Phone (416) 314-0004 Fax: (416) 314-8743 Toll free 1-800-668-3946

APPEARANCES

Ontario Human Rights Commission	)	Stephen Wojciechowski, Counsel
Dena Potocnik, Complainant	)	On her own behalf
City of Thunder Bay, Respondent	)	Allan D. McKittrick, Counsel

This is an interim decision on a motion by the Respondent, the City of Thunder Bay. The motion came at the close of the Ontario Human Rights Commission's case. The City has asked me to dismiss the complaint for lack of evidence, and the immediate question that has arisen is whether I can hear this motion without first calling on the City to make an election as to whether it intends to call evidence.

The parties made written submissions on the issue of whether I should order the City to make its election, and I also heard oral argument by way of telephone conference call.

If I rule that the City need not make such an election, then I will hear the motion to dismiss the complaint and rule on it. The City has stated clearly that if I force an election now, the City will elect to call evidence. In such a situation, the motion to dismiss becomes more or less academic, since I would not be ruling on it until all the evidence from both sides is heard.

The City concedes that an election is the normal procedure on a motion to dismiss (a non-suit) in a civil case, but argues that the rules are less rigid in an administrative tribunal such as this, and that the particular circumstances of this case make it just and convenient not to force an election. The Commission argues that an election is unnecessary only in the exceptional case, and that there is nothing about this case that would require me to deviate from the normal practice of ordering an election.

This complaint was filed in October, 1988, and alleges direct and systemic discrimination on the basis of sex. The complainant, Dena Potocnik, was and still is a City employee. She applied for, but was denied, two senior positions, City Treasurer and Deputy City Treasurer, and alleges that the decisions not to promote her were violations of the *Human Rights Code* R.S.O. 1990, c.H.19, as amended.

After a hearing on preliminary matters in September, 1995, I ordered the disclosure of documents related to numerous job competitions conducted by the City (decision dated

Oct. 27, 1995). Hundreds of pages of these documents have been put into evidence by the Commission at the hearing.

In addition to the large volume of documents, the Commission's case also consisted of 15 witnesses, who gave evidence during 22 hearing days spread over about four months. Aside from the complainant herself, almost all evidence was from individuals who would normally be expected to testify for the City rather than the Commission. These included Paul Milligan, who has been present throughout the hearing as the City's advisor, but who was called as a witness for the Commission. Mr. Milligan was the successful candidate in 1988 for City Treasurer, and was deeply involved in the hiring of the Deputy City Treasurer. These are the two positions at issue.

These facts suggest that this case is already somewhat out of the ordinary. Most, and probably all of the main players in the hiring for the two positions that are at issue have already been heard from, and the City has yet to begin its case. Nevertheless, the City estimates that in order to fully respond to the allegations, particularly the complaint of systemic or adverse effect discrimination, it will take about 20 more days of hearings.

As mentioned above, both the Commission and the City agree that the normal, even firm, practice in the civil courts (except in defamation cases) is to require an election from a defendant who has asked that a case be dismissed for lack of evidence. This practice has generally been followed in tribunals such as the Human Rights Board of Inquiry, although with less rigidity. The rationale appears to be that the defendant, or in this case the respondent, should have to decide whether it should close its case or risk having some of its evidence help the other side. When there is no election, the respondent cannot lose: if the motion is granted, the case is dismissed without the respondent having to expose the weaknesses of its case; and if the motion is not granted, the respondent still has its chance to

present its evidence without having risked anything. As the Board of Inquiry said in *Nimako v. CN Hotels,* (1985), 6 CHRR D/2894 (paragraph 23568?):

> In approaching this question it is important to bear in mind that it is only upon the completion of the whole case that a tribunal is in a position to weigh the evidence and come to a decision, and it may happen that evidence adduced from witnesses called on behalf of the defendant (or an accused) tips the scales against him or her. Having regard to the difficulties complainants face in getting access to all the information relevant to establishing discrimination, this may well be more likely to be the case in hearing under the *Human Rights Code* than in civil actions generally. ....[I]t seems only fair that the defendant must make up his or her mind whether to close the case after the plaintiff's evidence is in, thus thwarting the plaintiff's access to evidence that might have made the latter's case, or to proceed to call witnesses at the risk of assisting the plaintiff's case.

A related concern is the risk to fairness inherent in having an adjudicator comment on the evidence of one side before the other side has presented its evidence. For this reason, it appears that where an adjudicator does not require an election and ends up rejecting the motion to dismiss the complaint, the proper procedure is to give no reasons. Otherwise, the party that is about to present its evidence would have the advantage of the adjudicator's thoughts on the evidence of the other party.

The City argues that the present case is exactly the type of situation that calls for an exception to the general rule of ordering an election. Given the amount of information already before me, including the testimony of all the main players in the impugned hiring decisions, there is less chance than usual, the City says, of its own witnesses bolstering the complainant's and Commission's case.

In addition, the City says the inquiry has already overridden the rights of many witnesses under the *Municipal Freedom of Information and Protection of Privacy Act, ("FOI")* R.S.O. 1990, .M56 to not to have disclosure of personal information such as the contents of personnel files. A continuation of the hearing will compel numerous other witnesses to

disclose information that otherwise would be protected under that "FOI" Act, and the City argues that respect for the rights of these potential witnesses should carry some weight if, in fact, the Commission has not so far presented enough of a case for the hearing to continue.

The City has also pointed to the cost of this hearing, and cites the case of *Tomen v. O.T.F. (No. 3)* (1989) 11 CHRR D/24. In that case, the Board of Inquiry relied on its own exclusive jurisdiction to conduct its own procedures, and decided to depart from the normal civil court practice of ordering an election. One of the reasons cited by the Board was the substantial cost of the hearing (at paragraphs 22 and 23.) The City points out that everyone's bills for the present hearing are being paid by a public sector that is currently under considerable financial strain, and argues simply that if this hearing can end, it should.

The Commission argues there is nothing exceptional about this case that warrants a departure from the practice of putting the respondent to an election. Ruling on a motion at this time requires an assessment of the evidence, the Commission argues, and there is only one proper time to assess the evidence, namely at the end of the case when all the evidence is in.

Further, the Commission, while conceding that many witnesses that would normally have been expected to give evidence for the City have already spoken, notes that it is still possible for some of those same witnesses to be called again; at that time, they will be cross-examined by the Commission, and weaknesses may be exposed.

I do not agree that hearing a motion to dismiss at this time requires me to make a comprehensive assessment of the evidence, except to the extent that I must determine whether there is even a case for the City to answer. As the Board stated in *Tomen, supra* (paragraph 29):

> I am bound to view the evidence through a narrow prism. I am not, as such evaluating conflicting evidence. The question before me in terms of the evidence is whether, taking the testimony in a light most favourable to the Commission, I can determine that it has carried the burden of proof in establishing a *prima facie* case.

> Should I find that this has been done, I am not bound, and it would be inappropriate for me to do more, at least as to the evidence, that indicate that the *prima facie* case has been made because there is *some* evidence which will support the complaints. (Emphasis in original).

I do not believe I am bound to follow the normal procedure in the civil courts. As the courts themselves have stated [see for example, *Cedarvale Tree Services and Labourers' International Union of North America Local 183* (1971) 22 DLR, (3d) 40 (Ont. C.A.], administrative tribunals are masters in their own houses and should adopt such procedures that appear just and convenient in the particular circumstances.

I am satisfied that the circumstances of this case warrant a departure from the usual rule compelling a respondent from electing whether to call evidence before its motion to dismiss for lack of evidence can be heard. The issue here is how to strike a balance between, on the one hand, the possible prejudice to the complainant and the Commission from my hearing and deciding a motion to dismiss at this point in the proceedings; and, on the other hand, the unfairness of continuing with a hearing if, in fact, the City can make the case that there is not enough evidence to continue. In this particular case, I believe the potential prejudice to the Commission and complainant is at a far lower level than it would be in most cases, because most of the major players who would have been expected to testify for the City have already given evidence, and because the City has, at the Commission's request I might add, disclosed hundreds of documents. The Commission cannot thwart this motion simply with a vague hope that the City's evidence will bolster the Commission's own case, given these circumstances.

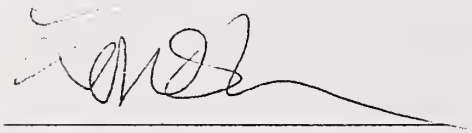
On the other hand, the City is faced with an allegation of constructive or adverse effect discrimination. The evidence has been wide-ranging, as it necessarily must be in an allegation of adverse effect discrimination. I have heard evidence about a large number of job competitions that took place over a 13-year period, from 1983 to 1995. When such a wide range of events is referred to in evidence, the complaint inevitably becomes onerous to

defend. The respondent City quite legitimately asks why it should be put to the trouble and cost of assembling a large body of evidence if, in fact, the complainant and Commission have not produced a *prima facie* case in 22 days of hearings.

It is clear to me that the potential prejudice to the City in requiring an election is far greater in this case than the potential prejudice to the Commission in not requiring one.

For the above reasons, I will hear the City's motion at the next hearing dates without requiring the City to elect whether to introduce evidence.

Dated at Toronto this 5th day of June, 1996.



Lorne Slotnick, Board of Inquiry